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In the Supreme Court of the United States

OCTOBER TERM, 1984

SAGINAW MINING COMPANY, PETITIONER

v.

LEWIS GIBAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

SANDRA LORD
Attorney
Department of Labor
Washington, D.C. 20210

16pp

QUESTION PRESENTED

Whether the Secretary of Labor acted within his express statutory authority in promulgating regulations that defined the term "total disability" under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 748 F.2d 1112. The opinion of the Benefits Review Board (Pet. App. 19a-27a) is reported at 6 Black Lung Rep. 1-18. The decision of the administrative law judge (Pet. App. 31a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on November 26, 1984. The petition for a writ of certiorari was filed on February 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (Act), 30 U.S.C. 901 *et seq.*, provides benefits to "coal miners * * * who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). The

Act expressly delegates to the Secretary of Labor, 30 U.S.C. 902(f)(1), authority to define the term "total disability." See *American Coal Co.* v. *Benefits Review Board*, 738 F.2d 387, 390 (10th Cir. 1984); *Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 78 (3d Cir. 1984). Pursuant to the Act, the Secretary promulgated regulations that permit a miner with ten years of coal mine employment to invoke a presumption of total disability due to pneumoconiosis by meeting specified medical requirements. See 20 C.F.R. 727.203(a). The regulations provide for rebuttal of the presumption by relevant medical evidence establishing inter alia that the disability is not total or that coal mine employment played no role in causing the disability. See 20 C.F.R. 727.203(b).[1]

2. After 24 years of employment as a coal miner for petitioner Saginaw Mining Co., respondent Lewis Gibas quit in 1978 because of a serious heart condition. In May 1979 he applied for benefits under the Act (Director's Exh. 1). The Department of Labor determined him to be eligible and named petitioner as the operator responsible for paying his benefits. Following a hearing sought by petitioner, an administrative law judge (ALJ) concluded that Gibas had successfully invoked the presumption of total disability due to pneumoconiosis by introducing sufficient x-ray evidence of the disease. Pet. App. 33a-34a.[2]

Petitioner attempted to rebut that presumption. Under 20 C.F.R. 727.203(b)(3), petitioner was required to present "evidence establish[ing] that the total disability * * * of the

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[1]The regulations at issue in this case, 20 C.F.R. 727.200 *et seq.*, are interim criteria promulgated by the Secretary in accordance with the Act (Pub. L. 95-239, 92 Stat. 95 *et seq.*). Permanent criteria, applicable to claims filed after March 31, 1980, are contained in 20 C.F.R. Pt. 718. See 20 C.F.R. 718.1, 718.2.

[2]The question whether Gibas presented sufficient evidence to invoke the presumption is not before this Court. See Pet. 15.

miner did not arise in whole or in part out of coal mine employment." Petitioner submitted the deposition of a physician who opined that Gibas's disability was due to cardiovascular disease and not to pneumoconiosis (Pet. App. 3a, 35a). The ALJ rejected this medical opinion as "unduly speculative" (*id.* at 36a) and ruled that petitioner had not carried its burden of proving that Gibas's disability was in no part caused by pneumoconiosis. Relying on the length of Gibas's coal mine employment, on the x-ray showing simple pneumoconiosis, on evidence of disabling conditions including shortness of breath and on the report of a physician who testified that Gibas had lung disease, the ALJ concluded that Gibas was entitled to benefits (*ibid.*).

3. The Benefits Review Board (Board) reversed. Relying on its decision in *Jones* v. *The New River Co.*, 3 Black Lung Rep. 1-199 (Ben. Rev. Bd. June 10, 1981), the Board held that the rebuttal provision (20 C.F.R. 727.203(b)(3)) was inconsistent with the Act's requirement of total disability and, accordingly, that the words "in whole or in part" should be stricken from the regulation (Pet. App. 5a).[3] Under the provision as revised by the Board, a presumption of disability is rebutted if it is shown that the miner's pneumoconiosis was not in and of itself totally disabling. See *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 122 (4th Cir. 1984); *Jones*, 3 Black Lung Rep. at 1-209. Applying that standard to the facts of this case, the Board concluded that the evidence that Gibas's disability was due to heart disease and not to pneumoconiosis sufficed to defeat his claim for benefits as a matter of law (Pet. App. 23a).

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[3]In light of the fact that all courts of appeals that have considered the question have rejected the Board's position, the Board recently granted reconsideration en banc in *Borgeson* v. *Kaiser Steel Corp.*, No. 81-1934 BLA (Ben. Rev. Bd. Feb. 25, 1985) to revisit its decision in *Jones*.

4. On appeal, the United States Court of Appeals for the Sixth Circuit rejected the Board's reasoning that the regulation improperly permitted the award of benefits for less than total disability. The court of appeals held that the regulation "has nothing to do with the degree of a miner's disability" (Pet. App. 14a) and that the "in whole or in part" language refers to causation, not to extent of disability (*id.* at 15a). Because 20 C.F.R. 727.203(b)(3) does not permit the award of benefits to miners who are less than totally disabled, the court of appeals concluded that the provision is consistent with the statutory goal of providing benefits to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment (Pet. App. 15a).

Finally, the court of appeals reviewed the record and determined that there was substantial evidence to support the ALJ's conclusion that petitioner had failed to meet its burden of rebutting the presumption (Pet. App. 15a-16a).[4]

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioner's primary contention (Pet. 7-14) is that 20 C.F.R. 727.203(b)(3) is inconsistent with the Act because it permits the award of benefits to miners who are only partially disabled. All courts of appeals that have considered the question have correctly agreed, however, that the regulation does not have that meaning and is consistent with the Act. See *American Coal Co.*, 738 F.2d at 391; *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123 (4th Cir. 1984);

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[4]In addition, the Sixth Circuit rejected the Secretary's contention that the Board lacked authority to revise the regulation.

Alabama By-Products Corp. v. *Killingsworth*, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984); *Carozza*, 727 F.2d at 78.[5]

As the court below recognized (Pet. App. 15a), the regulation does not permit benefits to be awarded for partial disability. Rather, it affords an employer the opportunity to prove that pneumoconiosis played no part in causing a miner's total disability. If the employer satisfies the evidentiary burden of 20 C.F.R. 727.203(b)(3), it may defeat a claim for benefits. Where, however, that showing is not made and pneumoconiosis is therefore a contributing cause of a miner's total disability, benefits will be awarded. Pet. App. 15a.

In effect, petitioner contends that a miner is entitled to benefits only when his total disability is caused *solely* by Black Lung disease (see Pet. 11, 12). But the statute requires only that the total disability be "due to pneumoconiosis."[6] 30 U.S.C. 901. The Secretary's interpretation that permits benefits to be awarded to a miner whose total disability is caused in some part by pneumoconiosis is consistent with the statute and reasonably related to its purpose, as the courts of appeals have unanimously ruled. *E.g.*, Pet. App. 15a; *Bethlehem Mines Corp.*, 736 F.2d at 124; *Carozza*, 727 F.2d at 78.[7]

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[5]The Board, moreover, seems disposed to reconsider its position that 20 C.F.R. 727.203(b)(3) conflicts with the Act. See note 3, *supra*.

[6]"Pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. 902(b), see 20 C.F.R. 727.202.

[7]"To uphold [the agency's interpretation] 'we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' We need only conclude that it is *a* reasonable interpretation of the relevant provisions." *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 422-423

The Fourth Circuit stated in *Bethlehem Mines Corp.*, 736 F.2d at 124 that:

> The "in whole or in part" language of section 727.203(b)(3) simply reflects the current uncertain state of medical knowledge concerning the exact consequences of prolonged exposure to coal dust. * * * The reality of coal mine employment is such that many physical and environmental factors may converge to produce a totally disabling respiratory or pulmonary impairment. The Secretary's rebuttal regulation acknowledges this reality * * *. A less demanding standard would effectively remove a large class of miners from the remedial scope of the Black Lung Act — a result hardly compatible with the overarching purposes of the Act.

2. Petitioner argues further (Pet. 20-23) that the court of appeals erroneously shifted the burden of proof to the employer to show that Gibas's disability did not arise out of his coal mine employment. This contention is without merit. A party attempting to rebut a presumption based on a statute or a regulation may properly bear the burden of persuasion, see, *e.g.*, *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403-404 n.7 (1983); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 669 (1979); and the courts have uniformly held that 20 C.F.R. 727.203(b) in fact shifts the burden to the coal mine operator. See, *e.g.*, Pet. App. 16a; *American Coal Co.*, 738 F.2d at 390; *Bethlehem Mines Corp.*, 736 F.2d at 124; *Alabama By-Products Corp.*, 733 F.2d at 1514; *Consolidation Coal Co.* v. *Smith*, 699

(1983) (emphasis in original; citations omitted), quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, No. 82-1071 (June 5, 1984), slip op. 9; see *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-372 (1973).

F.2d 446, 449 (8th Cir. 1983).[8] As the courts of appeals have noted, the decision relied upon by petitioner, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), involved presumptions that differed significantly from 20 C.F.R. 727.203(b), in that they did not require the rebutting party to "establish" particular facts and thus to bear the burden of persuasion. See *Alabama By-Products Corp.*, 733 F.2d at 1515. Accord, *American Coal Co.*, 738 F.2d at 390.[9]

3. Finally, petitioner contends (Pet. 14-20) that it met its burden of rebuttal under 20 C.F.R. 727.203(b)(3) as a matter of law because it presented a medical opinion that Gibas's disability was in no part due to pneumoconiosis. Specifically, petitioner argues (Pet. 16) that the ALJ was required to give controlling weight to the medical opinion it submitted because Gibas introduced no contrary medical opinion.

The law is clear, however, as petitioner recognizes (Pet. 16), that the ALJ was not bound to credit the testimony of a single medical expert, even if that testimony was not directly refuted. See *Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d 1426, 1430 (10th Cir. 1984); *Director, Office of Workers' Compensation Programs* v. *Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741, 742 (5th

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[8]Petitioner's reference (Pet. 18-19) to the "primary cause" requirement contained in 20 C.F.R. 410.426(a) is unavailing because that regulation has no application to the adjudication of Gibas's claim. Since the claim in this case was filed after the effective date of the regulations at 20 C.F.R. Pt. 727, Gibas may qualify for benefits under the presumption at 20 C.F.R. 727.203, which contains no primary cause requirement. See 20 C.F.R. 727.1-727.4; 20 C.F.R. 718.1(b).

[9]Petitioner's additional arguments based on Rule 301 of the Federal Rules of Evidence (Pet. 21-22), have been rejected by this Court. See *Transportation Management Corp.*, 462 U.S. at 403-404 n.7. Accord, *Alabama By-Products Corp.*, 733 F.2d at 1515; *American Coal Co.*, 738 F.2d at 390.

Cir. 1962). The trier of fact may weigh the medical evidence and draw his own inferences which, if based on substantial evidence, will be upheld on appeal. *Kaiser Steel Corp.*, 748 F.2d at 1430; *Todd Shipyards Corp.*, 300 F.2d at 742 ("[F]act finders are not bound to decide according to doctors' opinions if rational inferences lead in the other direction."). Cf. *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *NLRB* v. *Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).[10]

Here, the ALJ considered and weighed all the evidence. See Pet. App. 33a-36a. In rejecting as "unduly speculative" the medical opinion that Gibas's disability was due to cardiovascular disease and not pneumoconiosis, the ALJ relied on record evidence concerning Gibas's 24 to 29 years of coal mine employment under dusty conditions, his x-ray showing simple pneumoconiosis, his disabilities (including shortness of breath), and the report of an examining physician who found evidence of lung disease. See Pet. App. 3a-4a. There was, accordingly, substantial evidence in the record supporting the ALJ's decision; but even if there was not, further review of this factbound issue would not be warranted. See *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951).

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[10]The cases cited by petitioner (Pet. 17-18) are not to the contrary. Those authorities require only that an ALJ's rejection of medical opinion must be based on a discernible rationale supported by substantial evidence. *E.g., Richardson* v. *Perales*, 402 U.S. 389 (1971); *Cotter* v. *Harris*, 642 F.2d 700, 706 (3d Cir. 1981); *King* v. *Califano*, 615 F.2d 1018, 1020 (4th Cir. 1980); *Peabody Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 581 F.2d 121, 124 (7th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

SANDRA LORD
Attorney
Department of Labor

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